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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 IN RE: CATHODE RAY TUBE (CRT)
17 ANTITRUST LITIGATION

Master File No. 3:07-cv-5944 SC
MDL No. 1917

18 This document relates to:

19 *Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,*
20 *No. 11-cv-05513-SC*

21 *Best Buy Co., Inc., et al. v. Technicolor SA, et*
22 *al., No. 13-cv-05264-SC*

23 *Target Corp. v. Chunghwa Pictures Tubes,*
24 *Ltd., et al., No. 3:07-cv-05514-SC*

25 *Target Corp. v. Technicolor SA, et al., Case*
26 *No. 3:11-cv-05514-SC*

27 *Alfred H. Siegel, as Trustee of the Circuit City*
28 *Stores, Inc. Liquidating Trust v. Hitachi, Ltd.,*
et al., No. 11-cv-05502-SC

Alfred H. Siegel, as Trustee of the Circuit City

**DIRECT ACTION PLAINTIFFS' REPLY
BRIEF IN SUPPORT OF THEIR
MOTIONS *IN LIMINE* (NOS. 1-18)**

The Honorable Samuel Conti

Date: TBD

Time: TBD

Ctrm: Courtroom 1, 17th Floor

i
DIRECT ACTION PLAINTIFFS' REPLY BRIEF
IN SUPPORT OF THEIR MOTIONS *IN LIMINE* (NOS. 1-18)
MDL No. 1917

1 *Stores, Inc. Liquidating Trust v. Technicolor*
2 *SA, et al.*, No. 13-cv-05261-SC
3 *Sears, Roebuck and Co., et. al. v. Chunghwa*
4 *Picture Tubes, Ltd., et al.*, No. 11-cv-5514

5 *Sharp Electronics Corporation, et al. v.*
6 *Hitachi, Ltd., et al.*, No. 13-cv-01173-SC

7 *Sharp Electronics Corp., et al. v. Koninklijke*
8 *Philips Electronics N.V., et al.*,
9 No. 13-cv-2776-SC

10 *ViewSonic Corporation v. Chunghwa Picture*
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Introduction

Direct Action Plaintiffs (“DAPs”) submit this reply brief in support of their Motions *in Limine* 1-10 and 12-17 (the 11th Motion *in Limine* has been moved to a different schedule by stipulation (Dkt. 3623) and the 18th Motion *in Limine* has been rendered moot by stipulation between the parties. For the reasons stated below, Defendants’ arguments raised in their opposition are meritless: the DAPs’ motions should be granted.

Direct Action Plaintiffs’ Reply in Support of Their MIL No. 1 to Exclude Evidence or Argument Regarding Plaintiffs’ Competitive Intelligence Practices

To support their opposition, Defendants erroneously rely on prior decisions by the Court addressing the question of whether certain competitive intelligence evidence was discoverable under the liberal discovery policy underlying the Federal Rules of Civil Procedure. Those decisions were expressly limited to discoverability and did not address the issue of admissibility, which requires a showing that evidence is both relevant, and not likely to cause undue prejudice or delay, confuse the issues or mislead the jury.

Defendants’ opposition demonstrates that they intend to rely on Plaintiff’s competitive intelligence activities to mislead the jury and improperly prejudice Plaintiffs. Defendants’ argument that such evidence is relevant to excuse their own conduct is based on the false premise that Plaintiff’s competitive intelligence activities are somehow parallel to Defendants’ vast price fixing conspiracy. And while disclaiming any intent to smear Plaintiffs, that is precisely what one Defendant did in a recent LCD trial in painting Plaintiffs as deceitful corporate actors that engaged in purported “sneaky tricks” to gather market intelligence.¹ This is just the sort of

¹ See Declaration of Jonathan Ross (“Ross Decl.”) Ex. A, LCD Trial Tr., at 266 (Toshiba opening statement: “Best Buy has – and you will hear a lot about this – a very sophisticated competitive intelligence unit devoted to gathering information about Best Buy’s competitors.”); *id.* at 267 (“[Best Buy] used all of their contacts (and a few sneaky tricks) to get this information . . . Again, aggressive gathering of intelligence on competitors.”); *id.* at 269 (“Best Buy employees would go into competitors stores with secret microphones, pretending they’re on the telephone, but instead, stating into their recorder the price of everything they see . . . Tricks.”).

1 inappropriate and misleading sideshow tactics that Rule 403 is meant to prevent. Defendants'
 2 other relevance arguments are simply pretextual and do not justify the introduction of Plaintiff's
 3 competitive intelligence practices. This case is about Defendants' conduct. The Court should not
 4 permit Defendants to turn it into a veritable sideshow about Plaintiffs.
 5

6 Indeed, in a reasoned opinion, the Court in the Costco LCD trial saw right through
 7 Defendant's tactics and excluded evidence of Costco's competitive intelligence practices,
 8 reasoning that whatever "marginal relevance" such evidence had "was substantially outweighed
 9 by its potential to prejudice the jury, confuse it, or put greater burdens on its time." *Costco*
 10 *Wholesale Corp. v. AU Optronics Corp., et al.*, 2014 U.S. Dist. LEXIS 132145, at *6 (W.D.
 11 Wash. Sept. 17, 2014). The *Costco* Court wisely refused to allow these collateral issues to infect
 12 and overwhelm the real issues for trial, and this Court should do the same.

13 **I. Discoverability Does Not Equate to Admissibility**

14
 15 Defendants make much of this Court's prior order allowing discovery into Plaintiffs'
 16 competitive intelligence practices. Defendants' Opposition to DAPs MIL Nos. 1-18 ("Opp.") at 2,
 17 3, 4, 8, 10. However, admissibility requires a different and much greater showing than mere
 18 discoverability.² This Court's prior ruling on Best Buy's motion for a protective order was
 19 plainly limited to discoverability questions. *See* Dkt. 2714 (Ex. H to Motion,) at 5 ("in deciding
 20 whether the information sought is discoverable...the Court must determine if the material sought
 21 is 'relevant to any party's claim or defense.'[citation omitted] **Such evidence need not be**
 22 **clearly admissible at trial** so long as the request is 'reasonably calculated to lead to the
 23 discovery of admissible evidence.'") (Emphasis added.) The Court did not prejudge the probative
 24 value or likely prejudicial effect of competitive intelligence evidence. *See id.* at 11 ("Evidence of
 25 how the competitive intelligence program operates **might** still be admissible (**or at least lead to**
 26 **the discovery of admissible evidence**) at trial...") (Emphasis added.) Accordingly, Defendants'
 27

28 ² Compare Fed. R. Civ. Pro. 26(b)(1) with Fed. R. Evid. 401, 402, 403, 801, 901.

1 heavy reliance on this order is misplaced. This Court has yet to rule on the admissibility of this
2 evidence, and good reasons exist to exclude it at trial.
3

4 **II. Evidence of Plaintiffs' Competitive Intelligence Practices Is Inadmissible**

5 Only relevant evidence is admissible. Fed. R. Evid. 402. However, not all evidence that
6 is relevant is admissible. The proponent of evidence at trial must also establish that the probative
7 value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of
8 issues, misleading the jury, or wasting time. Fed. R. Evid. 403.
9

10 Here, Plaintiffs' conduct is irrelevant. But, even if it were marginally relevant, it is its
11 *incremental* probative value, above and beyond other available evidence, which must be weighed
12 against its tendency to unfairly prejudice Plaintiffs. *United States v. Beechum*, 582 F.2d 898, 927
13 (5th Cir. 1978) (Courts must balance the *incremental probative value* of evidence against its
14 potential for unfair prejudice,); *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) (where the
15 probative value is slight, moderate prejudice is unacceptable). Defendants ignore these
16 incremental relevance principles.
17

18 Defendants will have ample opportunity to put on evidence to defeat liability or contest
19 Plaintiffs' damages. Any incremental probative value to be gained from competitive intelligence
20 evidence would be entirely eclipsed by the very real unfair prejudice Plaintiffs would suffer from
21 admission. *Costco Wholesale Corp. v. AU Optronics Corp. et al.*, 2014 U.S. Dist. LEXIS 132145
22 at *6 (W. D. Wash. Sept. 17, 2014) (marginal relevance of plaintiff's price monitoring
23 substantially outweighed by potential unfair prejudice); *City of Long Beach v. Standard Oil Co. of*
24 *California*, 46 F.3d 929, 938 (9th Cir. 1995) (affirming Rule 403 exclusion of evidence relating to
25 allegedly similar conduct of other market participants in a different state because "evidence
26
27
28

would have been of marginal relevance . . . and would have injected needless confusion into an already complex case”). Accordingly, this evidence should be excluded.

1. Plaintiffs Competitive Intelligence Practices Are Irrelevant to Liability

Defendants argue, pretextually, that Plaintiffs’ competitive intelligence activities are relevant to liability. Specifically, Defendants argue that Plaintiffs’ conduct is needed to rebut Plaintiffs’ claims that competitive contacts and price monitoring are circumstantial evidence of an illegal conspiracy. Opp. at 4. But this is a false comparison based upon a false premise. Defendants may not isolate specific Plaintiff competitor contacts in the abstract and claim that their own conduct is somehow justified by them for at least two reasons. First, Plaintiffs are not on trial here. Whatever they did or did not do is simply not probative of liability in the same way as Defendants’ actions.³ Second, Plaintiffs’ contacts took place in an entirely different context in which the goal was to keep prices to consumers low, whereas Defendants’ contacts were in furtherance of an ongoing conspiracy to stabilize or raise prices. Never the twain shall meet. Plaintiffs intend to prove that Defendants met and conspired to fix prices, and then pursued frequent information exchanges to facilitate their previously reached agreements. Sharp also intends to prove that the Defendants’ information exchanges caused elevated prices under a rule-of-reason analysis. Thus, proof of Defendants’ information exchanges is a relevant piece of the cartel activity at issue.

It does *not* follow from this that Defendants may introduce evidence of Plaintiff’s activities to show that mere information exchange, without more, is legal.

Moreover, the jury will be instructed on this issue, and thus will understand the significance of information exchanges. Indeed, Defendants do not dispute that a jury instruction is dispositive of this issue. Notably, Defendants argue vociferously elsewhere in

³ See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

1 their Opposition that a jury instruction is the proper remedy. *See* Opp. at 18:7-8. They fail to
 2 explain why a jury instruction is not also the proper remedy here.
 3

4 In short, the significance of information exchange is the proper province of jury
 5 instructions, and cannot give Defendants justification to muddy the waters with otherwise
 6 irrelevant evidence of Plaintiffs' conduct. *In re Polyester Staple Antitrust Litig.*, 2005 U.S. Dist.
 7 LEXIS 47179, at *10, 19-20 (W.D.N.C. 2005) ("Defendants do not need to obtain documents
 8 exchanged between [Plaintiffs] in order to establish this point as the law unequivocally requires
 9 more than 'mere contacts and communications.'").

10 Defendants misstate the *Keifer-Stewart* cases as applying only to evidence of the
 11 Plaintiff's wrongful conduct. Not so. It makes no difference whether the conduct at issue is
 12 characterized as benign or malignant. In fact, the fundamental antitrust policy articulated in the
 13 *Kiefer-Stewart* line of cases applies with equal force irrespective of how the defendant
 14 characterizes the plaintiff's conduct. *See, e.g. Frost v. Shipowners & Merchs. Towboat Co.*, 1974
 15 U.S. Dist. LEXIS 8570, at *9 (N.D. Cal. 1974) (following *Kiefer* and holding that "the defense
 16 urged here by defendants, no matter how characterized, is insufficient in law" even though "there
 17 is no claim whatsoever that the subject matter of the plaintiff's activity ... is in any manner
 18 criminal or contrary to public policy." [emphasis added]); *Perma Life Mufflers v. Int'l Parts*
 19 *Corp.*, 392 U.S. 134, 139-140 (1968) (allegation that the plaintiff was involved in similar conduct
 20 did not constitute a defense to an antitrust claim where the plaintiff's alleged participation in the
 21 conspiracy "was not voluntary in any meaningful sense." [emphasis added]).⁴
 22

23 Indeed, numerous courts have rejected the argument that evidence of the plaintiff's
 24 competitor contacts – even those alleged to be proper – is relevant to excuse the defendants' own
 25 conduct. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 2006 U.S. Dist. LEXIS 34129, at
 26

27 ⁴ Moreover, Judge Walker implicitly rejected the premise that *Keifer* only applies to bar in evidence of
 28 unclean hands or *in pari delicto* (where the defendant alleges that the plaintiff's conduct was also illegal)
 by holding that *Keifer* applies here to exclude evidence of Plaintiffs' meetings with competitors. *See* Ex.
 G to Motion.

1 *22-24 (E.D. Pa. 2006) (rejecting claim that plaintiffs' financial statements and downstream sales
2 were relevant to prove the nonexistence of a price-fixing scheme, and holding that "Plaintiffs'
3 activities are almost wholly irrelevant in proving or disproving the underlying charge. This claim
4 must be substantiated by evidence of Defendants' activities, not Plaintiffs'."); *In re Polyester*
5 *Staple Antitrust Litig.*, 2005 U.S. Dist. LEXIS 47179, at *10 (W.D.N.C. 2005) ("Defendants do
6 not need to obtain documents exchanged between [Plaintiffs] in order to establish this point as the
7 law unequivocally requires more than 'mere contacts and communications.'"); *In re Aspartame*
8 *Antitrust Litig.*, 2008 U.S. Dist. LEXIS 121490, at *6-7 (E.D. Pa. 2008) (denying motion to
9 compel evidence of plaintiffs' communication with third parties and rejecting defendants'
10 arguments that these documents were relevant to show "plaintiffs' buying power, market position
11 and demand elasticity."). Defendants offer no meaningful response to this settled authority.
12

13 The *Costco* trial court most recently confronted this same issue and got it exactly right. A
14 conspirator cannot excuse its illegal conduct by equating it to the plaintiff's conduct—lawful or
15 unlawful. *Costco Wholesale Corp.*, 2014 U.S. Dist. LEXIS 132145 at *6 ("Defendants can easily
16 argue that monitoring market prices is lawful without pointing to Costco's conduct.")
17

18 Defendants feebly attempt to distinguish the *Costco* ruling by claiming that the decision
19 only addressed the monitoring of publicly posted pricing information. Opp. at 2. This is untrue,
20 and in any event, is a distinction without a difference. There is nothing in the *Costco* court's
21 rationale which even suggests that it was motivated by the scope of the competitive intelligence
22 practices at issue. In fact, if anything, the court's apparent concern that the evidence would lead
23 to a distracting sideshow is redoubled where, as here, more robust competitive intelligence
24 practices are at issue.

25 The Defendants rely heavily upon Judge Illston's one-line ruling admitting competitive
26 intelligence evidence in the Best Buy LCD trial. Opp. at 5. However, that order has no
27 precedential value. Judge Illston ruled on the issue in one line of a Final Pretrial Scheduling
28 Order without providing any explanation of the basis for her ruling. It may be that at the time

Judge Illston was unaware of the full extent and nature of the sideshow Defendants intended to create based on this evidence. Defendants disingenuously claim that Judge Illston admitted competitive intelligence evidence “for [the] very purpose” of showing that there may be legitimate reasons for exchanging information with competitors. Opp. at 4-5. The text of the order does not support this baseless claim.⁵

What the parties and the Court now know is that Defendants have every intention of creating a full-blown sideshow exploring in great detail the nature and quality of Plaintiffs’ competitor contacts. This evidence will be time consuming, confusing for the jury, and highly prejudicial to Plaintiffs. Defendants’ pretextual claims of liability relevance have been rejected by several courts and do not pass muster. According, this evidence must be excluded. *See, e.g., United States v. Oldbear*, 568 F.3d 814, 821 (10th Cir. 2009) (affirming exclusion of defense evidence that non-parties engaged in similar conduct because the “everybody-is-doing-it defense . . . was a sideshow from which the jury could have gleaned little valuable information . . . [and] only would have served to sidetrack the jury into consideration of factual disputes only tangentially related to the facts at issue”).

2. Plaintiffs’ Competitive Intelligence Practices Are Irrelevant to Downstream Pass-Through

Defendants next argue, unpersuasively, that evidence of competitive intelligence is necessary to establish how “Plaintiffs’ discussions of or comparisons with the pricing of their competitors and their ability to utilize those prices in its negotiations with CRT product vendors would be reflected in the final sale prices.” They further argue that, “[t]he extent to which Plaintiff’s competitive intelligence program tracked component or CRT product costs ... and

⁵ Defendants also claim that Judge Illston allowed competitive intelligence evidence in a second time, citing to a portion of the LCD DPP class trial transcript. Opp. at 5, fn. 2. However, a cursory review of the transcript makes it plain that the evidence was admitted *without objection*. See Brass Decl., Ex. 2. Thus, the contention that Judge Illston twice ruled to admit this evidence is misleading and misstates the record.

1 whether any such information impacted pricing negotiations for their purchases of CRT products
2 is directly relevant to whether Plaintiff suffered injury-in-fact.” Opp. at 10.⁶ These arguments
3 are plainly pretextual.
4

5 First, price negotiations between Plaintiffs and their vendors would have taken place in a
6 but-for world in which Defendants had never conspired. Thus, retailers would have exerted
7 whatever negotiating power or leverage they had in reaching price agreements with vendors in
8 any case. There can be no possible reduction in damages resulting from conduct which would
9 have been unchanged in the but-for world.

10 Second, overcharge calculations are the subject of extensive and highly complex
11 econometric modeling by the parties’ experts based on a massive amount of data from entities in
12 various links of the distribution chain and spanning over a decade. Evidence of competitive
13 intelligence hardly adds anything to the econometric equation, and any supposed marginal
14 incremental value hardly justifies Defendants’ scheme to make this case about Plaintiffs.

15 Third, Defendants have access to Plaintiffs’ purchase data, and they know the prices
16 Plaintiffs actually paid.

17 Fourth, Defendants also took extensive discovery of Plaintiffs to ascertain the factors they
18 considered in setting downstream prices. Needlessly inserting evidence regarding *how* Plaintiffs
19 obtained the information used in setting prices is irrelevant, prejudicial, and likely confusing for
20 the jury.

21 Fifth, the argument now that this evidence is “directly relevant” is belied by the discovery
22 record. In response to Defendants’ demand, Best Buy produced a corporate designee to testify
23 about the process by which Best Buy negotiated, entered into, approved or ratified purchase
24 agreements. Best Buy did so. Yet, Defendants failed to ask a single question on the extent to
25

26
27 ⁶ Defendants also argue that pass-on is relevant to Best Buy’s state law claims under Minnesota law. Opp.
28 at 9. This argument is erroneous for the reasons stated in Plaintiff’s Motion *in Limine* No. 2. See also the
Reply in support of Plaintiff’s Motion *in Limine* No. 2, herein at 10-18. To avoid unnecessary duplication,
Plaintiffs will not repeat those arguments here.

1 which Best Buy resisted price increases based on its knowledge about component costs, or
 2 whether such information impacted Best Buy's pricing negotiations for its purchases of CRT
 3 products. If this subject were "highly relevant", as Defendants now claim, one would expect
 4 them to have at least probed the subject at deposition.
 5

6 As such, the evidence is not relevant to the amount of Plaintiffs' damages, and should be
 7 excluded.

8 **3. Any Marginal Relevance is Substantially Outweighed by the Danger of Unfair**
 9 **Prejudice, Confusing the Issues, Misleading the Jury and Undue Delay**

10 Rule 403 allows this Court to balance the probative value of evidence with its tendency to
 11 cause unfair prejudice, confuse the issues, mislead the jury, or waste time. Fed. R. Evid. 403.
 12 Evidence of Plaintiffs' competitive intelligence practices implicates *all* of the enumerated
 13 concerns.
 14

15 Defendants' fanciful relevance theories are pretext for introducing irrelevant, unfairly
 16 prejudicial, and time-consuming evidence about the specific competitive intelligence practices of
 17 numerous Plaintiffs. The prejudicial effect of this evidence cannot be overstated. If permitted,
 18 Defendants will use the evidence to turn the trial into a sideshow battle over the business conduct
 19 and ethics of the Plaintiffs. The jury will be blitzed with endless testimony and argument about
 20 Plaintiffs' communications with competitors, Plaintiffs' corporate ethics policies,⁷ and the so-
 21 called "sneaky tricks" they used to gather market intelligence.⁸
 22
 23

24 ⁷ Ross Decl. Ex. B, *TFT-LCD* Trial Tr. at 1189-1303 (exhaustive cross examination on Best Buy
 25 competitive intelligence practices and compliance with code of ethics); *id.* at 1358 (Toshiba counsel
 26 recognizing that "Best Buy code of ethics . . . has been a centerpiece of my examination"); Ross Decl. Ex.
 C, *TFT-LCD* Trial Tr. at 3487-91 (Toshiba closing argument) (same).

27 ⁸ *See supra*, fn. 1.
 28

1 This case is fundamentally about *Defendants'* conduct: whether Defendants conspired in
 2 violation of the Sherman Act, and the impact and damages caused to Plaintiffs by that particular
 3 conduct. These core issues will be complex enough for the jury to process and resolve, and
 4 should not be confused by extensive evidence and argument concerning Plaintiff-specific
 5 "competitive intelligence" practices which have no bearing whatsoever on Plaintiffs' claims.
 6

7 Plaintiffs would be prejudiced substantially and unfairly if their case were hijacked by
 8 these issues. *See, e.g., Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 645 (7th Cir. 2011)
 9 (affirming exclusion of "sideshow" evidence that risked "sending the trial off track" and causing
 10 "prejudicial spillover" on other parties); *United States v. Oldbear*, 568 F.3d 814, 821 (10th Cir.
 11 2009) (affirming exclusion of defense evidence that non-parties engaged in similar conduct
 12 because the "everybody-is-doing-it defense . . . was a sideshow from which the jury could have
 13 gleaned little valuable information . . . [and] only would have served to sidetrack the jury into
 14 consideration of factual disputes only tangentially related to the facts at issue").
 15

16 As in *Costco*, and as in the cases cited above, evidence of Plaintiffs' competitive
 17 intelligence activities is substantially outweighed by the potential for unfair prejudice, jury
 18 confusion and undue consumption of time, and must be excluded. *Costco Wholesale Corp. v. AU*
 19 *Optronics Corp. et al.*, 2014 U.S. Dist. LEXIS 132145, at *6.
 20

21 For all of these reasons, the Court should exclude evidence and argument regarding
 22 Plaintiffs' competitive intelligence practices.
 23

24 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 2 to Exclude Evidence or**
 25 **Argument Regarding Downstream Pass-Through**

26 No downstream pass-on defense exists for Defendants in this case. Defendants admit the
 27 defense is barred under Federal law. Defendants claim entitlement to the defense under
 28

1 Minnesota law, but to no avail.

2
3 First, the Minnesota Legislature has abolished the pass-on defense by statute, and the
4 Minnesota Supreme Court so found in two unequivocal decisions. Defendants, in an effort to
5 avoid the consequences of the MAA and the referenced decisions, take the untenable position that
6 Minnesota has purportedly abolished pass-on for purposes of “standing” but somehow preserved
7 the defense to a “damages” claim. The pass-on defense was abolished, period. The Minnesota
8 Supreme Court’s detailed discussion of pass-through of “damages” simply cannot be reconciled
9 with Defendants’ claim that the decision is limited to “standing.”

10 Second, Defendants assert pass-on evidence must be considered to avoid duplicative
11 recovery. The extent of duplicative recovery, however, can be established in post-trial
12 proceedings without the need to introduce inadmissible and prejudicial pass-through evidence at
13 trial.⁹ Indeed, any analysis of duplicative recovery the Court is purely discretionary under the
14 Minnesota Antitrust Act. Notably, Courts have time and again held that duplicative recovery is in
15 many if not all cases alleging a nationwide conspiracy involving both direct and indirect
16 purchaser classes a necessary consequence that flows from the indirect purchaser recovery.
17 Finally, even if pass-through was a viable defense under the Minnesota Antitrust Act (it isn’t), no
18 defense expert has calculated any purported downstream pass-on. As such, this purported defense
19 fails for want of proof in any event.
20
21
22
23

24
25 ⁹ *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 10-cv-4572 SI, Dkt. 167 (May 25, 2012); *see*
26 *also Mattel, Inc. v. MGA Entm’t, Inc.*, 2011 U.S. Dist. LEXIS 85928, at *56-57 (C.D. Cal. August
27 4, 2011) (stating that remittitur is proper vehicle to address claim of duplicative recovery);
28 *Morrison Knudson Corp. v. Ground Improvement Techs, Inc.*, 532 F.3d 1063, 1079 (10th Cir.
2008 (same)); *Eccleston v. New York City Health & Hosps. Corp.*, 698 N.Y.S.2d 869, 870 (1998)
(same); *Louis De Gilio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng’g Co., Inc.*, 302 Minn.
19, 29 (1974) (same).

III. Argument

1. Pass-Through Evidence Is Irrelevant Under The Minnesota Antitrust Act

a. Defendants' Argument That *Lorix* and *Philip Morris* are "Standing" Cases Cannot Be Reconciled With the Courts' Discussion of Pass-Through of "Damages"

The Minnesota Antitrust Act ("MAA") provides as follows:

Any person * * * injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. *In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.*

Minn. Stat. § 325D.57 (emphasis added). The MAA thus unambiguously gives courts discretion to consider duplicative recovery. It does not require them to do so, nor does it permit a pass-on defense. Two dispositive Minnesota Supreme Court decisions construing the MAA confirm this. *See, e.g., Lorix v. Crompton*, 736 N.W.2d 619 (Minn. 2007); *State v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996).

In *Philip Morris*, the Minnesota Supreme Court explained that "it was the intent of the Minnesota legislature to abolish the availability of the pass-through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices." 551 N.W.2d at 491. The Minnesota Supreme Court then rejected Philip Morris's argument—the same essential argument that Defendants make here—that damages incurred by the plaintiff would simply be passed down to the next party in the stream of commerce. The Minnesota Supreme Court reasoned, "[s]imilar, but not identical, to the tobacco companies' defense that Blue Cross suffered no injury and could not therefore make out a tort claim, the 'pass through defense' is, in essence, the notion that where an injured party 'passes through' its damages to another entity that is obligated to pay, there is no actual injury to the first party." *Id.* Thus, when the Minnesota Supreme Court held that Blue Cross had standing, it meant, *a fortiori*, that Blue

1 Cross had alleged an actual injury despite the existence of potential pass-through.

2 The Minnesota Supreme Court explained its rejection of the defendants' pass-on
3 arguments in detail. "The argument that no injury has been suffered because costs were passed
4 through one entity to customers, consumers, or other entities usually arises in antitrust cases. It
5 has been uniformly rejected in the courts, primarily on the theory that the injury is sustained as
6 soon as the price, artificially raised for whatever reason, has been paid." *Id.* Quoting from
7 Justice Holmes's decision in *Chattanooga Foundry*, the Court observed that a plaintiff has been
8 harmed if they have been overcharged, period:

9 [a] man is injured in his property when his property is diminished. . . . [W]hen a
10 man is made poorer by an extravagant bill we do not regard his wealth as a unity, or
11 the tort, if there is one, as directed against that unity as an object. We do not go
12 behind the person of the sufferer. We say that he has been defrauded or subjected to
duress, or whatever it may be, and stop there.

13 551 N.W.2d at 496-97 (quoting *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 399 (1906)). The
14 Minnesota Supreme Court then appealed to Justice Holmes's opinion in *Southern Pacific Co. v.*
15 *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918), which also rejected the pass-through
16 defense as diminishing in any way a plaintiff's actual damages:

17 The only question before us is...whether the fact that the plaintiffs were able to pass
18 on the damage...prevents their recovering the overpayment...The answer is not
19 difficult. The general tendency of the law, in regard to damages at least, is not to go
20 beyond the first step...The plaintiffs suffered losses...when they paid. Their claim
accrued at once in the theory of the law and it does not inquire into later events.

21 *Philip Morris*, 551 N.W.2d at 497. The Supreme Court could not have been clearer in its
22 rejection of the sort of pass-on defense Defendants seek here, stating, "[t]hat the pass through
23 defense is untenable appears equally evidence outside of the context of antitrust and laws relating
24 to regulated industry." 551 N.W.2d at 497.

25 In *Lorix*, the Minnesota Supreme Court again construed the MAA and rejected the federal
26 test for antitrust standing under *Associated General Contractors of California, Inc. v. California*
27 *State Council of Carpenters*, 459 U.S. 519 (1983), reasoning that Minnesota does not follow
28 federal law. In doing so, Minnesota Supreme Court noted that duplicative recovery of damages

can be proper under the MAA:

To the extent that our courts cannot ameliorate the risk of duplicative recovery, as where parallel proceedings in federal courts or courts in other states may result in later awards based on the same injuries, this risk is inherent in the dual system of private antitrust enforcement created by *Illinois Brick and California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989).

736 N.W.2d at 628. The Supreme Court further explained: “While this risk [of duplicative recovery] is a legitimate and important consideration, it is not a risk that our court may remedy by restricting Minnesota antitrust law in ways that our legislature has not.” *Id.* at 628.¹⁰

Thus, *Lorix* also addresses and rejects the pass-through defense. Defendants, however, erroneously attempt to argue otherwise. Defendants contend, for example, that *Lorix* cited to *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), “as an example of the pre-*Illinois Brick* law it would follow” and that “to the degree Minnesota meant to restore and adopt cases like *In re Western Liquid Asphalt* as its own, it also meant to adopt the rule that a plaintiff could only recover damages for an overage that was not passed on.” *Opp.* at 17. Defendants’ contention is without merit.

The Minnesota Supreme Court in *Lorix* stated that “[c]laims of overcharge due to price fixing of components several steps removed from the ultimate consumer proceeded past motions to dismiss and for summary judgment in federal courts prior to *Illinois Brick*.” *Lorix*, 736 N.W.2d at 633. The Minnesota Supreme Court then cited *Western Liquid Asphalt* as “holding that

¹⁰ Defendants contend that the State of Minnesota has consistently argued that the “express language in the [Minnesota antitrust] statute requires it to be applied so that defendants are not subject to duplicative liability,” quoting *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435 (9th Cir. 1987), *overruled on other grounds by California v. ARC Am. Corp.*, 490 U.S. 93 (9th Cir. 1989). Defendants provide no support for “the State of Minnesota has consistently argued” as asserted. Nor is there any support for the claim that express language of the MAA requires its application to avoid duplicative liability. Any such claim is contrary to the plain language of the MAA and the interpretation of the MAA by the Minnesota Supreme Court in *Philp Morris* and *Lorix*, as demonstrated above. Thus, the quoted language in the Ninth Circuit opinion does not accurately reflect or characterize the MAA and should be disregarded.

1 plaintiffs, states that accepted bids for road construction projects including liquid asphalt supplied
 2 to contractors at inflated prices, had standing to sue asphalt suppliers.” *Lorix*, 736 N.W.2d at 633.
 3 Thus, in citing *Western Liquid Asphalt*, the Minnesota Supreme Court was simply acknowledging
 4 that “contrary to *Illinois Brick*, Minnesota antitrust law permits indirect purchasers to recover.”
 5 *Lorix*, 736 N.W.2d at 626-627. The Minnesota Supreme Court did not cite *Western Liquid*
 6 *Asphalt* for the statement that “in passing-on cases, the intermediary should recover the amount of
 7 the overage that was not passed on,” which Defendants rely upon in their Opposition. Opp. at 17.
 8 Nor did Minnesota “restore and adopt as its own” *Western Liquid Asphalt* (a Ninth Circuit case).
 9 Thus, based on Defendants’ own logic, Minnesota did not adopt any purported rule to the effect
 10 that “a plaintiff [can] only recover damages for an overcharge that was not passed on.” Opp. at
 11 17. Indeed, as demonstrated above, the MAA does not so provide. As such, Defendants’ reliance
 12 upon *Western Liquid Asphalt* is misplaced.
 13

14 In short, the Court should reject Defendants’ attempt to rewrite the MAA. See, e.g., *Lorix*,
 15 736 N.W.2d at 628 (refusing to “restrict Minnesota antitrust law in ways that our legislature has
 16 not.”).

17 Finally, instead of tackling the MAA and the *Lorix* and *Philip Morris* decisions in earnest,
 18 Defendants cite to *Ray v. Miller Meester Adver., Inc.*, 684 N.W.2d 404, 407 (Minn. 2004), a case
 19 that construed the scope of recoverable damages under the *Minnesota Human Rights Act*. Putting
 20 aside that *Ray* (unlike *Lorix* and *Philip Morris*) did not construe the MAA, *Ray* did not limit
 21 compensatory damages to “damages that repay actual losses.” Opp. at 15. Instead, it noted that
 22 compensatory damages may include damages of up to “three times the actual damages.” *Id.*
 23 Thus, *Ray* does not support application of any alleged pass-on defense here.
 24

25 **b. Considerations Of Duplicative Recovery Do Not Require Introduction Of**
 26 **Pass-Through Evidence At Trial**

27 Defendants argue that the introduction of pass-through evidence at trial is necessary to
 28 avoid duplicative recovery and to prevent an unfair windfall to middlemen such as the Best Buy

1 plaintiffs. Opp. at 15-16. But analysis of duplicative recovery is only permissive under the
 2 MAA, and duplicative recovery is consistent with the policy underlying antitrust law. Moreover,
 3 even if relevant, duplicative recovery can be resolved in post-trial proceedings. Thus,
 4 Defendants' argument is without merit and provides no basis for denying the Motion.
 5

6 (i) **Duplicative Recovery Is Consistent With The Policy Underlying**
 7 **Antitrust Law**

8 Case law militates strongly against Defendants' attempt to minimize their damage
 9 exposure through their transparent allocation of recoveries strategy. The defendants in *In re*
 10 *Flash Memory Antitrust Litigation*, 643 F. Supp. 2d 1133, 1156 (N.D. Cal. 2009) complained in
 11 similar fashion that "a duplicative recovery 'is a near certainty' given that the Direct Purchasers'
 12 claims also are before the Court." 643 F. Supp.2d at 1156. But, rather than viewing this as
 13 problematic, the court found that "[s]uch a concern . . . generally is inapposite in the context of
 14 indirect purchaser state law antitrust claims." 643 F. Supp. 2d at 1156. Quoting Judge Hamilton in
 15 DRAM, Judge Armstrong observed that the *Illinois Brick* repealer States:
 16

17 [H]ave necessarily made the policy decision that duplicative recovery
 18 may permissibly occur. Duplicative recovery is, in many if not all
 19 cases alleging a nationwide conspiracy with both direct and
 indirect purchaser classes, a *necessary consequence* that flows
 from indirect purchaser recovery.

20 643 F. Supp.2d at 1156 (emphasis added) (*quoting In re Dynamic Random Access Memory*
 21 *Antitrust Litig.*, 516 F. Supp. 2d 1072, 1093 (N.D. Cal. 2007)); *see also* (N.D. Cal. January 23,
 22 2013) *Tech Data Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Line) Antitrust Litig.)*, 2013
 23 U.S. Dist. LEXIS 9696, at *47 (N.D. Cal. January 23, 2013) (granting plaintiffs' motion to
 24 dismiss counterclaims and strike defenses concerning duplicative recovery, reasoning that
 25 "[d]uplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both
 26 direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser
 27 recovery."").
 28

(ii) **Even If Relevant, Duplicative Recovery Can Be Resolved In Post-Trial Proceedings**

Even if relevant, duplicative recovery need not be addressed at the trial here. Indeed, the MAA specifically contemplates resolution of duplicative recoveries in a “separate action.” Moreover, to the extent “[d]efendants wish to challenge any allocation of damages, they are free to do so post-trial.” *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 10-cv-4572 SI, Dkt. 167 (May 25, 2012); *see also Mattel, Inc. v. MGA Entm’t, Inc.*, 2011 U.S. Dist. LEXIS 85928, at *56-57 (C.D. Cal. August 4, 2011) (stating that remittitur is proper vehicle to address claim of duplicative recovery); *Morrison Knudson Corp. v. Ground Improvement Techs, Inc.*, 532 F.3d 1063, 1079 (10th Cir. 2008 (same)); *Eccleston v. New York City Health & Hosps. Corp.*, 698 N.Y.S.2d 869, 870 (1998) (same); *Louis De Gilio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng’g Co., Inc.*, 302 Minn. 19, 29 (1974) (same). The same result is warranted here.

2. Defendants Concede Pass-On Evidence Is Irrelevant By Failing To Offer Any Expert Opinion On Purported Downstream Pass-On

Defendants claim that pass-through is a viable affirmative defense. Pass-through is not a viable defense under the MAA, but even if it were, no defense expert has calculated any purported downstream pass-on rates. As such, the defense fails for want of proof.

3. Defendants Concede The Supreme Court Has Barred A Downstream Pass-On Defense For Federal Antitrust Claims

Defendants concede that federal law prohibits the pass-on defense, and therefore admit that the Court can and should preclude Defendants from directly or indirectly raising the pass-on defense to the federal antitrust claims. Yet they insist that evidence of Best Buy’s profit margins and downstream pricing is relevant. It isn’t, and Defendants are trying to do indirectly what they cannot do directly. This is textbook impermissible downstream pass-on evidence that should be excluded. *Costco Wholesale Corporation v. Au Oprtronics Corporation, et al.*, 2014 U.S. Dist. LEXIS 132145, at *6 (W.D. Wash. Sept. 17, 2014) (“Defendants may not rely on evidence or

1 argument suggesting . . . that Costco passed that overcharge along to its customers.”).

2
3 Defendants further contend that they are purportedly entitled to present downstream pass-
4 on evidence in any trial of Plaintiffs that includes indirect purchasers under state laws. This
5 further demonstrates that there should be separate trials as set for in Plaintiffs’ motion for separate
6 trials. *See* Dkt. 2897.

7 For all of the reasons stated in the Motion and above, Plaintiffs respectfully request that
8 the Court grant Plaintiffs’ Motion in its entirety.

9
10 **Direct Action Plaintiffs’ Reply in Support of Their MIL No. 3 to Exclude Evidence or**
11 **Argument Regarding Private Label CRT Products**

12 Defendants concede that the DAPs’ damages claim does not allow them to present
13 evidence or argument regarding private label CRT products as no DAP is making a claim for
14 CRTs contained in such products. Nor do Defendants in their opposition make any argument
15 against any DAP’s program but Best Buy; thus as an initial matter Defendants concede that no
16 such evidence is relevant against the other DAPs..

17
18 Defendants argue that evidence of Best Buy’s private label CRT products is relevant
19 because it shows (1) that Best Buy had knowledge of CRT costs through a component sourcing
20 program, and (2) that Best Buy’s private label CRT televisions competed with the defendants’
21 CRT televisions. Neither contention is remotely true. First, Best Buy did not utilize component
22 sourcing for CRT televisions: the evidence cited by Defendants is unrelated to Best Buy’s private
23 label CRT television line. Second, private label and non-branded televisions did not compete
24 with Defendants’ branded CRT televisions, serving instead as opening price point products.
25
26
27
28

I. Best Buy Did Not Source Any of the Components for Its CRT Private Label Products.

As stated in the motion and unrefuted by defendants, Best Buy did not source any of the components for its CRT private label products. DAP MIL at 20. Instead of citing to evidence related to Best Buy's CRT Finished Product private label program, Defendants' citations to the contrary are flat out misleading. Instead of citing to the evidence related to Best Buy's CRT Finished Product private label program, Defendants cite to evidence related to Best Buy's LCD Finished Product private label program, which was entirely different.

For instance, Defendants rely on an October 2004 email regarding negotiations with Medion AG as a supplier "for Best Buy's private label CRT monitors." Opp. at 21. But these negotiations were about LCD notebooks and desktops, not CRT televisions. Moreover, Best Buy witnesses testified that Medion AG did not manufacture the Insignia brand CRT monitors. *See* Ross Dec. Ex. D, Fritz Tr. at 308. While Defendants also cite to testimony at an LCD trial about the cost of components being relevant to consideration or evaluation of private label products, Opp. at 21, this testimony again was with respect to Best Buy's LCD private label program only.

Thus it is irrelevant whether Best Buy objected to this kind of evidence in LCD. Quite simply, while Best Buy utilized component level sourcing with LCD products, it did not do so with CRT products. Best Buy's private label program is therefore irrelevant to any issue in this trial and should be kept out.

II. Best Buy's Private Label CRT Televisions Did Not Compete with Defendants' Branded CRT Televisions.

Defendants further assert that Best Buy's private label CRT televisions competed with defendants' branded televisions, and thus evidence and argument regarding the private label

1 program should be allowed. Defendants are wrong because Best Buy's private label program
 2 consisted of opening price point products that did not compete with defendants' products.
 3

4 To support their argument, Defendants' rely on a single irrelevant document and
 5 deposition testimony regarding Best Buy's CRT monitor business. While the document was
 6 produced by Best Buy, it does nothing more than analyze other retailers' average pricing
 7 differential between those retailers' private label products and the national brands. *See*
 8 Defendants' Opposition at 21-22. Thus the document does not have anything to do with Best
 9 Buy's private label program.
 10

11 As for the proffered testimony, it involved CRT computer monitors, not CRT televisions.
 12 Thus this testimony cannot support Defendants arguments that Best Buy's private label television
 13 business competed with defendants' branded televisions. Moreover, competition between entry-
 14 level monitors and Defendants' branded products does not bear on Defendants' ability to pass on
 15 the supracompetitive pricing of their CRT overcharges to Best Buy. For the foregoing reasons,
 16 this evidence does not support Defendants' attempt to divert the jury's attention towards Best
 17 Buy's irrelevant private label business.
 18

19
 20 **Direct Action Plaintiffs' Reply in Support of Their MIL #4: Exclude Evidence or Argument**
 21 **Regarding Plaintiffs' Purported "Market Power"**

22 Defendants concede that they cannot introduce evidence at trial suggesting that Plaintiffs
 23 engaged in Sherman Act violations. Opp. at 23. Yet, in their opposition, Defendants confirm
 24 their strategy to refer to Plaintiffs' "strong market share, reputation, and industry leadership, as
 25 well as . . . ability to negotiate for more favorable terms" at trial. *Id.* Given the established
 26 meaning of "market power" in an antitrust case—and no allegation in this case that any individual
 27 Plaintiff could (or did) raise *market* price or restrict *market* output—the suggestion of Plaintiffs
 28 having market power at trial would be prejudicial, confusing, and misleading. Fed. R. Evid. 403.

1 “The defense that plaintiffs’ economic power could have kept the prices . . . down is irrelevant
2 where, as here, the crucial issue is whether there was a conspiracy to fix prices.” *In re Vitamins*
3 *Antitrust Litig.*, 198 F.R.D. 296, 301 (D.D.C. 2000). This litigation is about Defendants’ illegal
4 conduct, and any suggestion that Plaintiffs possessed market power should be excluded.
5

6 First, MIL No. 4 would not exclude information or evidence that does not suggest market
7 power, and Defendants unnecessarily complicate this issue by implying that it would. What
8 Plaintiffs paid for CRT products, and evidence establishing negotiations between a Plaintiff and
9 its suppliers would not be excluded. All that would be covered by this motion are Defendants’
10 suggestions of Plaintiff market power. Order at 6, *Costco Wholesale Corp. v. AU Optronics*
11 *Corp.*, No. 13-1207 (W.D. Wash. Sept. 17, 2014) (Dkt. No. 569) (“This ruling excludes evidence
12 that, Costco’s bargaining power allowed it to obtain better prices than others, but it does not
13 prohibit evidence or argument about the prices Costco paid for the finished products at issue.”).
14 Defendants can and will argue at trial that their conspiracy did not raise prices, but they cannot
15 use the inapplicable and prejudicial concept of “market power” to do so.

16 Second, Defendants’ argument that market power has a broader “commonly understood
17 meaning” outside of antitrust cases necessarily cannot apply to expert witnesses. Even if market
18 power did have a different meaning for lay witnesses, Defendants may not rely on any broader
19 colloquial meaning of the term to support any *expert* testimony regarding a term with a very
20 specific meaning in this very specific context. Defendants have conceded that market power as
21 used in antitrust law refers to an element of a “restraint” on competition. Opp. at 24. Plaintiffs
22 are not accused by any Defendant of restraining competition. Therefore, at a minimum, any
23 evidence or argument involving expert witnesses suggesting that Plaintiffs had “market power”
24 should be excluded.

25 Third, Defendants’ supposed “commonly understood meaning” of “market power”
26 *confirms* why any such evidence would be irrelevant, misleading, and inappropriate. Defendants
27 wrongly claim a term must be “derogatory or pejorative” to require exclusion, but the legal
28

standard merely weighs the probative value against the risk of unfair prejudice. Defendants plan to rely on the prejudicial implications “of a company’s having competed successfully.” Opp. at 25. Here, the unfair prejudice of any such “success” by Plaintiffs would necessarily outweigh its probative value, as it has none. Plaintiffs are entitled to recover for an overcharge that establish, regardless of their profitability during the conspiracy period. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). “To suggest that a conspiracy was not as successful as it might have otherwise been because of the plaintiffs’ countervailing economic power is absurd. Such an alleged ‘economic check’ is of no consequence in a price fixing case.” *In re Folding Carton Antitrust Litig.*, 1978 U.S. Dist LEXIS 20409, at *4 (N.D. Ill. May 5, 1978), *rev’d in part on other grounds*, 744 F.2d 1252, 1254 (7th Cir. 1984); *In re Aspartame Antitrust Litig.*, 2008 U.S. Dist. LEXIS 121490, at *16-17 (E.D. Pa. Apr. 8, 2008) (denying motion to compel documents to show “plaintiffs’ buying power” and “market position”).

Defendants should be excluded from using “market power” wordplay to create a contrary impression at trial. Plaintiffs’ motion to exclude any such arguments should be granted.

Direct Action Plaintiffs’ Reply in Support of Their MIL No. 5: Motion to Exclude Evidence or Argument regarding Plaintiffs’ Ability to Seek Treble Damages and Attorneys’ Fees and Costs

Defendants’ opposition recognizes that references to the trebling of damages under the Clayton Act before the jury would be “an invitation to the jury to negate Congress’ determination that actual damages should be trebled.” *Brooks v. Cook*, 938 F.2d 1048, 1052 (9th Cir. 1991). Nevertheless Defendants maintain that the jury should be informed of this impermissible topic – antitrust treble damages - through cross-examination of the current and former employees of Chunghwa, the ACPERA applicant.

In support of their motion, Defendants contend that during the LCD trial Judge Ilston explicitly approved a line of cross-examination that raised the issue of treble damages. Judge

1 Ilston did no such thing. To the contrary, Judge Ilston precluded Toshiba's counsel from
 2 mentioning the trebling of damages under the Clayton Act, and instead allowed a line of inquiry
 3 that reflected the fact that the amnesty applicant's potential liability was reduced by two-thirds
 4 because of its cooperation with Plaintiffs:
 5

6 THE COURT: Well, I'll allow you to ask him. And we should somehow get this
 7 to [the witness] – because he probably knows about trebling. Say, 'And you can
 8 reduce your damages to a third of what they might be, or reduce them by two
 thirds.'

9 See Ross Decl. Ex. E, Tr. of Proceedings, June 13, 2012, 1962:18–22. Thus, Judge Ilston's ruling
 10 was entirely consistent with the Ninth Circuit's rule that the jury may not hear testimony or
 11 argument regarding treble damages. See *Brooks*, 938 F.2d at 1052.
 12

13 Defendants have not provided any reason the Court could depart from binding Ninth
 14 Circuit precedent. Although Defendants are entitled to address a witnesses potential bias, this
 15 right is not unlimited, and Defendants may not delve into areas of bias that are cumulative of
 16 other evidence. See *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984) ("The defense
 17 had already amply demonstrated the bias of this witness Thus, the evidence sought by Lester
 18 was cumulative, and its exclusion was not prejudicial. We therefore find the trial court's ruling to
 19 be proper."). That same rationale applies with full force to Chunghwa's testimony here.
 20

21 The effect of ACPERA's limitations on Chunghwa's potential civil liability would occur
 22 primarily by exempting Chunghwa from joint and several liability for damages flowing from its
 23 conspirators' conduct. Indeed, the limitation on joint and several liability reduces Chunghwa's
 24 civil liability by more than 80% itself. See Ross Decl. Ex. F, Reply Expert Report of Dr. Dennis
 25 Carlton, August 5, 2014, at 73-74 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]. Thus, ACPERA's additional limitation on any trebling of Chunghwa's

1 civil liability is just a small part of the benefit that Chunghwa receives by blowing the whistle on
 2 Defendants' crimes. Because the jury is allowed to hear about the substantial impact that the joint
 3 and several limitation would have on Chunghwa's potential liability, ACPERA's limitation on
 4 trebling is cumulative and has little probative value.

5
 6 The Court can exclude all evidence of treble damages as required by the Ninth Circuit *and*
 7 allow Defendants to fully examine any bias on the part of the Chunghwa witnesses without
 8 reference to the trebling provisions of the Clayton Act by permitting the line of cross-examination
 9 approve by Judge Ilston in *LCD*. Accordingly, to the extent the Court permits any cross-
 10 examination on the benefits received by ACPERA's anti-trebling limitation, it should narrow the
 11 scope of Defendants' questioning to acknowledge a two-thirds reduction of Chunghwa's liability
 12 without informing the jury that other defendants' damages would be trebled by the Court.
 13
 14

15 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 6: Motion to Exclude Evidence**
 16 **or Argument Regarding Other Actions and Settlements in this MDL**

17 Evidence that there are other cases pending in this MDL is not probative of the price-
 18 fixing conspiracy that Defendants participated in from the 1990s to the 2000s. And even if there
 19 is probative value in evidence of settlements agreements entered into between various DAPs and
 20 various Defendants, such evidence should be excluded pursuant to Rules 403 and 408 because its
 21 probative value is substantially outweighed by the potential for unfair prejudice and jury
 22 confusion as well as the potential to chill settlement discussions. The risks of chilling settlement
 23 discussions, unfair prejudice, and jury confusion justify excluding evidence of other actions and
 24 settlements in this MDL.
 25

26 Even if some evidence of another action or a settlement in this action may be properly
 27 admitted, it is appropriate to first require the offering party to approach the bench. In that way,
 28

1 the parties and the Court will have specific context of what evidence is being offered and how.
 2 The Court will have the opportunity to make an informed ruling about whether the evidence is
 3 admissible and for what purpose, as well as provide any appropriate limiting instructions at that
 4 time. Without such precautions, the jury might be exposed to evidence that should not be
 5 admitted, or to evidence that should only be admissible for a limited purpose. That is a bell that
 6 cannot be unrung. The Court should grant the DAP's motion *in limine* no. 6.
 7

8
 9 **I. The fact that there are other actions by Plaintiffs, or against Defendants, is not**
 10 **relevant to any claim in this case.**

11 The DAPs' claims against Defendants are based on allegations that Defendants illegally
 12 conspired from the mid-1990s to the mid-2000s to fix the prices of CRTs. Whether there are
 13 other actions against these same Defendants arising from the same conspiracy, or whether any of
 14 the DAPs have filed actions against non-parties based on that conspiracy, is simply not probative
 15 of whether *these* DAPs are entitled to recover from *these* Defendants. Instead, the jury might
 16 improperly use evidence of another suit against a Defendant, or another suit by a Plaintiff, to
 17 reduce damages in this case. Such evidence is properly excluded from the jury. *See, e.g.,*
 18 *McLeod v. Parsons Corp.*, 73 F. App'x 846, 854 (6th Cir. 2003) (evidence of other lawsuits
 19 against defendant not relevant); *Henderson v. Peterson*, 2011 WL 2838169, at *5 (N.D. Cal. July
 20 15, 2011) (evidence of other lawsuits filed by plaintiff "substantially outweighed by the danger of
 21 jury bias"); *Tinius v. Carroll Cnty. Sheriff Dep't*, 2004 WL 3103962, at *2 (N.D. Iowa Dec. 22,
 22 2004) (precluding "reference to the fact that parties have been dismissed from this case" "because
 23 the court concludes that such evidence is irrelevant to resolution of the merits of the issues
 24 involved in this litigation"); *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt-*
 25
 26
 27
 28

1 *Meridian Constr. Corp.*, 1994 WL 577637, at *1 (S.D.N.Y. Oct. 19, 1994) (referring to order
2 excluding “evidence relating to previously dismissed parties or causes of action”).
3

4 Defendants instead build a straw man—a hypothetical witness employed by a party to a
5 *different* action with a resulting interest in the outcome of *this* case. But that proves too much.
6 The vast majority of witnesses are current or former employees of parties to this action, for whom
7 no such issue would arise. And in the unlikely event that Defendants’ doomsday scenario comes
8 to pass for a particular witness, it would not be unduly burdensome to require Defendants to first
9 approach the bench for permission to inquire about the other action. *See Bates v. Dura Auto. Sys.*,
10 *Inc.*, 2011 WL 2618235, at *8 (M.D. Tenn. July 1, 2011) (“If the plaintiffs decide to introduce
11 evidence of other suits at trial, however, their counsel should alert the court before doing so, so
12 that the court may assess the evidence outside the presence of the jury . . .”).
13
14

15 **II. The Court should grant the DAPs’ motion in limine as to settlements in this case.**

16 Defendants do not dispute that Rule 408 bars the use of settlement agreements “to prove
17 or disprove the validity or amount of a disputed claim.” Fed. R. Evid. 408(a); Opp. at 29.
18 Defendants instead focus on Rule 408’s “another purpose” exception, claiming that, to test the
19 credibility of witnesses associated with Defendants who have settled with one or more
20 Plaintiffs,¹¹ they should be allowed to present the fact, amount, and details of the settlement
21 agreements. Even if the settlement agreements are admissible to show “another purpose,” the
22 Court should still exercise its broad discretion to exclude them and further the public policy in
23 favor of settling disputed claims.
24
25

26 ¹¹ Due to the consolidated nature of this case, many Plaintiffs have settled with one or more
27 Defendants, and many Defendants have settled with one or more Plaintiffs. However, due to the
28 joint and several liability that a liable Defendant will face (other than, perhaps, amnesty applicant
Chunghwa Pictures Tubes Co., Ltd.), each Defendant remains motivated to dispute and minimize
Plaintiffs’ claims unless and until that Defendant has settled with each and every Plaintiff.

As a preliminary matter, the “another purpose” exception to Rule 408 is discretionary, not mandatory: “The court *may* admit this evidence for another purpose, such as proving a witness’ bias or prejudice” Fed. R. Evid. 408(b) (emphasis added); *see also Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) (“As a general proposition, a trial court has broad discretion as to whether to admit evidence of settlement negotiations offered for ‘another purpose.’”). In this way, courts can ensure that the policies behind Rule 408—to exclude evidence of questionable relevance and to favor compromise of disputes—are not vitiated through rote admission of settlement agreement evidence any time a litigant can articulate “another purpose.” *See* Fed. R. Evid. 408 advisory committee notes (explaining the public policy arguments for exclusion of settlement agreement evidence); *Trebor Sportswear*, 865 F.2d at 511 (“Care should be taken that an indiscriminate and mechanistic application of this exception to rule 408 does not result in undermining the rule’s public policy objective. The court should weigh the need for such evidence against the potentiality of discouraging future settlement negotiations.” (internal quotation marks and alterations omitted)). Here, if the Court were to rule that evidence of a settlement agreement is admissible anytime a witness employed by a settling Defendant testifies, based on some theoretical “bias,” that ruling would chill further settlement discussions among the parties. This result would also vitiate the public policy underlying Rule 408 by reducing the likelihood of additional compromises, ensuring that this action is not further simplified before trial through voluntary dismissal of fully settled parties.

Not only must Defendants show that settlement agreement evidence is admissible for another purpose and would not undermine the public policy in favor of compromise, but they must also show that it is not unfairly prejudicial or confusing under Rule 403. *See* Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed

by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . .”); *see also* *Alpex Computer Corp. v. Nintendo Co.*, 770 F. Supp. 161, 167 (S.D.N.Y. 1991) (“[I]t is well recognized that the risks of prejudice and confusion entailed in receiving settlement evidence are such that often Rule 403 and the underlying policy of Rule 408 to encourage settlement require exclusion even when a permissible purpose can be discerned.” (internal quotation marks and modifications omitted)). Defendants’ opposition does not address whether evidence of settlement agreements would or would not be unfairly prejudicial, but the very existence of Rule 408 makes clear that the danger is present. *See In re Exxon Valdez*, 229 F.3d 790, 799 (9th Cir. 2000) (“[J]uries are to be kept free of any outside influence that might lead them to inflate or reduce their damages award in order to ‘secure justice’ for the parties.”).¹²

Even if, as to a particular piece of settlement agreement evidence, Defendants are able to clear the three separate hurdles of articulating “another purpose,” demonstrating that admission would be consistent with the public policy favoring compromises, and showing that the evidence would not be unfairly prejudicial, there is still a danger of improper use. Once the jury hears the details of a settlement agreement, that bell cannot be unrung. *See Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 805 (6th Cir. 2007) (holding that a limiting instruction failed to cure the harm caused when the jury heard evidence of compromise discussions). For that reason, the DAPs respectfully submit that the prudent course is to require any party to first approach the Court and request, outside of the presence of the jury, to present such evidence. In that way, the

¹² This risk is particularly acute as it relates to the amounts of settlement agreements. The testimony of an employee of a Defendant that has settled is not likely to be any more or less biased based on the amount of a settlement agreement, as opposed to the fact of a settlement agreement. But the danger of the jury using evidence of the amount of a settlement is substantially higher than for the fact of a settlement. Accordingly, Judges Illston and Jones, in the *In re TFT-LCD (Flat Panel) Antitrust Litigation* decisions cited in the DAPs’ motion, excluded evidence of the amount of any settlement agreements from their respective cases.

1 Court may render a fully informed decision based on the discussion of the evidence and its use, as
 2 well as issue any necessary limitations in the particular context of the trial. This request is
 3 particularly appropriate given that Defendants argue that “it is unclear precisely how many
 4 agreements contain cooperation provisions,” Opp. 31, which means that Defendants necessarily
 5 wish to speculate about this in front of the jury.
 6

7
 8 **Direct Action Plaintiffs’ Reply in Support of Their MIL No. 7: Motion to Exclude**
 9 **Argument that Plaintiffs’ Claims Are Barred Because They Arise from Foreign**
 10 **Commerce**¹³

11 Defendants’ response to the DAPs’ seventh motion *in limine* confirms the DAPs’ fears
 12 that Defendants intend to use the FTAIA to confuse the issue at trial. The DAPs understand that it
 13 is their burden to demonstrate that their claims involve import commerce or satisfy the domestic
 14 effects exception to the FTAIA. But Defendants are not allowed to make irrelevant and factually
 15 unsupported characterizations of DAPs’ purchases, such as the anticipated claim by Defendants
 16 that the DAPs’ injuries arise from foreign commerce. As previously discussed, the DAPs are U.S.
 17 retailers and distributors whose Sherman Act claims are premised entirely on purchases made in
 18 the United States from members of the cartel, or from affiliate entities under common ownership
 19 or control with at least one member of the conspiracy.
 20

21 Accordingly, the DAPs will be able to demonstrate that their claims involve import
 22 commerce or satisfy the domestic effects exception. First, the DAPs will satisfy the import
 23 commerce exclusion by proving that a member of the conspiracy sold CRTs or products
 24 containing those CRTs to a customer in the United States or for delivery in the United States (*i.e.*,
 25
 26

27 ¹³ The claims of Plaintiffs Sharp Electronics Corporation and Sharp Electronics Manufacturing
 28 Company of America, Inc. are based only on purchases of CRTs in the United States and not on
 any finished products. They do not join in this reply and have filed their own separate reply.

the sale of the CRTs or products was an import). *See Costco Wholesale Corp. v. AU Optronics Corp. et al.*, Case No. 13-1207-RAJ, Dkt. No. 622, (W.D. Wash. Oct. 22, 2014) (“Costco LCD Jury Instruction No. 25”); *United States v. Hsiung*, – F.3d –, 2015 WL 400550, at *12-14 (9th Cir. Jan. 30, 2015).¹⁴ Second, the DAPs will satisfy the domestic effects exception by showing that Defendants sold CRTs or CRT Products to customers outside the United States, and that conduct had a direct, substantial, and reasonably foreseeable effect on consumers of CRT Products in the United States. *See* Ross Decl. Ex. G, Costco LCD Jury Instruction No. 25; *Hsiung*, 2015 WL 400550, at *15–18.

With their motion in limine, the DAPs merely ask the Court to require that Defendants tether their FTAIA arguments to these two legally permissible topics, rather than making sweeping and counterfactual generalizations about the DAPs’ claims failing due to foreign commerce that would only serve to confuse the jury about the role that the FTAIA plays in this case. Significantly, Judge Ilston entered a similar order in the LCD trial, *see* Ross Decl. Ex. H, MDL 1827 Dkt. 5597 at 4-5, and Defendants provide no reason why the Court should not do the same here. Accordingly, the Court should prevent Defendants from arguing, without factual or legal support, that DAPs’ claims are barred because they arise from foreign commerce.

Direct Action Plaintiffs’ Reply in Support of Their MIL No. 8 To Exclude Evidence Or Argument Regarding Plaintiffs’ Alleged Failure To Mitigate Their Damages

There is no affirmative defense of a “failure to mitigate” in horizontal price-fixing cases, and defendants’ assertions to the contrary fail under the most cursory scrutiny. Defendants

¹⁴ Contrary to Defendants’ assertions, *Hsiung* does preclude the invocation of the import commerce exclusion with a showing that the price-fixed component was imported inside a finished CRT product. As *Hsiung* recognized, AU Optronics did not manufacture finished LCD products, and so the fact that it did not import these products it did not make in the first place was obviously not relevant to the Court’s holding.

1 should not be permitted to introduce evidence or argument about any alleged failure by plaintiffs
2 to mitigate their damages.
3

4 Though defendants assert that “an antitrust plaintiff has a duty to mitigate or offset
5 its damages,” they fail to connect this generic principle to any specific rule of law applicable here.
6 *See* Opp. at 40. Judge Illston addressed the issue clearly in ruling on a nearly identical motion in
7 the *TFT-LCD* case: “While an antitrust plaintiff alleging a *refusal to deal or vertical price-fixing*
8 could reasonably be expected to mitigate damages by finding another supplier, a *victim of*
9 *horizontal price-fixing does not have this option.*”¹⁵ *In re TFT-LCD (Flat Panel) Antitrust Litig.*,
10 Nos. M 07–1827 SI, 10–1064 SI, 2012 WL 6000154, at *3 (N.D. Cal. Nov. 30, 2012) (emphasis
11 added). Numerous other courts have reached the same conclusion. *See In re Airline Ticket*
12 *Comm’n Antitrust Litig.*, 918 F. Supp. 283, 286 (D. Minn. 1996) (“In a horizontal price-fixing
13 case, however, mitigation and offset generally do not affect the ultimate measure of damages.”);
14 *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2010 WL 10086747, at *2 (N.D.
15 Cal. Dec. 16, 2010) (granting unopposed motion in limine to exclude evidence plaintiff failed to
16 mitigate its damages).
17
18

19 Defendants point to *no* authority holding that mitigation is an available defense in a
20 horizontal price-fixing case. Instead, they cite irrelevant precedent borrowed liberally from a
21 losing brief in an unrelated case. *See* Opp. at 40–41 (citing Defs.’ Reply in Supp. of Joint Mot.
22 for Partial Summ. J. Dismissing Best Buy’s (1) Pre-October 8, 2006 Claims as Time Barred and
23 (2) Post-May 2003 Claims for Failure to Mitigate Damages, *In re TFT-LCD (Flat Panel)*
24
25

26 ¹⁵ This same logic applies equally whether proving a price-fixing conspiracy through
27 evidence of a *per se* violation of the antitrust laws, or a violation via information exchanges under
28 a rule of reason theory. In either case, prices were elevated as a result of the conspiracy, and
there was no ability to mitigate by purchasing from another supplier because the conspiracy
involved nearly every major CRT manufacturer.

1 *Antitrust Litig.*, No. 3:07-md-1827-SI, [N.D. Cal. Sept. 14, 2012] ECF No. 6748)). Judge Illston
 2 rejected the same argument, based on the same caselaw, in the *TFT-LCD* case. *See In re TFT-*
 3 *LCD (Flat Panel) Antitrust Litig.*, 2012 WL 6000154, at *3. Defendants also rely on *MCI*
 4 *Communications Corp. v. AT&T*, 708 F.2d 1081, 1207 (7th Cir. 1983), for the proposition that a
 5 plaintiff must act to protect itself economically when faced with the possibility of damages from
 6 anticompetitive conduct. Opp. at 40. *MCI* is not binding precedent; defendants cite to a dissent,
 7 itself referencing jury instructions, that disclaimed condoning the jury instructions offered by the
 8 district court. *See MCI Commc'ns Corp.*, 708 F.2d at 1195 (“We present these materials for
 9 reference purposes only and do not mean to suggest any implicit approval, or disapproval, of
 10 either the instructions or the special verdict.”); *id.* (mitigation defense not at issue and jury
 11 charges related only to Section 2 of the Sherman Act).

12
 13
 14 Defendants’ other authority is similarly irrelevant and inapposite as it fails to discuss
 15 horizontal price-fixing conspiracies or analogous circumstances, a critical distinction because, as
 16 Judge Illston noted, the victim of a horizontal price-fixing conspiracy *cannot* mitigate its damages
 17 by finding another supplier. For example, *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir.
 18 1985), involved a vertical price-fixing conspiracy between a manufacturer and other distributors,
 19 not the horizontal price-fixing alleged here. *Id.* at 437 n.24 (holding plaintiff has a duty to
 20 mitigate damages by . . . obtaining product *from another source.*” (emphasis added)); *see also*
 21 *Hanover Shoe, Inc. v. United Shoe Mach.*, 392 U.S. 481, 483 (1968) (alleging violation of Section
 22 2 of the Sherman Act); *Litton Sys, Inc. v. AT&T*, 700 F.2d 785, 820 n.47 (2d Cir. 1983) (statement
 23 about antitrust plaintiff’s duties in footnote in a non-antitrust case, and citing to vertical price-
 24 fixing precedent). In *Borger v. Yamaha Int’l Corp.*, 625 F.2d 390, 399 (2d Cir. 1980), the
 25 plaintiff alleged a Section 1 refusal-to-deal violation when Yamaha allegedly participated in a
 26
 27
 28

1 group boycott against an electronics retailer, which again is significantly different than a
 2 horizontal price-fixing conspiracy. Similarly, in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 559
 3 (7th Cir. 1996), the Seventh Circuit addressed refusal-to-deal and group boycott violations of
 4 Sections 1 and 2 of the Sherman Act, finding that the plaintiff was required to mitigate the
 5 violation by pursuing an alternative investment when an initial investment was declined.
 6 Defendants' also rely on *Bemidji Sales Barn, Inc. v. Chatfield*, 250 N.W.2d 185 (Minn. 1977), a
 7 nearly forty-year-old Minnesota Supreme Court case regarding a breach of an express warranty
 8 for "breeding heifers," which has no application here either as precedent or as relevant to the facts
 9 of this case.
 10

11
 12 Defendants' argument that "Sharp's senior management suspected CRT suppliers were
 13 'conspiring,'" Opp. at 40, misstates the record. As explained in Sharp's¹⁶ Opposition to
 14 Defendants' Joint Motion for Partial Summary Judgment, the document to which defendants refer
 15 to contains an inaccurate interpretation of CRT pricing by a non-party. See Sharp's Opp. to
 16 Defs.' Mot. for Partial Summ. J. on Statute of Limitations Grounds at 5-7, Dec. 23, 2014 (MDL
 17 Dkt. No. 3283). SEMA's purchasing manager testified that this document did *not* put him on
 18 notice that Samsung SDI and LG Philips Displays were conspiring because the CRT prices listed
 19 in the document – which appeared to be identical to the document's Japanese authors – were in
 20 fact different prices because the numbers incorporated different shipping/delivery costs (one price
 21 was quoted "FOB" and the other was not). Thus the actual cost to SEMA of the two tubes was
 22 not the same, and as a result SEMA's purchasing manager did not believe Samsung SDI and LG
 23
 24
 25

26
 27 ¹⁶ As used in this brief, "Sharp" refers to plaintiffs Sharp Electronics Corporation and Sharp
 28 Electronics Manufacturing Company of America, Inc.

Philips Displays were conspiring. *See id.* at 6-7.¹⁷ Defendants cannot merely ignore facts they consider inconvenient to bolster an argument that fails as a matter of law. *See Ford Motor Credit Co. v. Hairston*, No. 4:06CV00004, 2006 WL 2850615, at *4 (W.D. Va. Oct. 2, 2006) (“It would be an absurd misapplication of the rule for mitigation of damages to expect the plaintiff to minimize injury before discovery of the breach.”).

But even assuming that mitigation were a proper defense to a horizontal price-fixing conspiracy, which it is not, defendants point to no reasonable action plaintiffs could have taken to mitigate their damages. Defendants first claim that Sharp should have filed a lawsuit or reported any suspicions about the cartel to authorities based on the incorrect assumption that evidence of the cartel existed. *Opp.* at 40. Allowing a “failure to mitigate” defense on this basis would eviscerate the applicable statute of limitations. Congress has determined that antitrust plaintiffs have four years to pursue damages. 15 U.S.C. § 15b. Accepting the defendants’ argument would rewrite the statute of limitations and require immediate action by a plaintiff in order to preserve its rights.¹⁸ That is not the law.

¹⁷ *Id.* at 6 (“Q: Why wouldn’t this language in the column associated with 25V tubes have caused you to believe that SDI and LPD might possibly have been conspiring in June of 2002? A: Well, here, it’s true, at 25V, where you can see “\$83,” where it’s circled, and the term is “landed in FOB San Diego.” So that means that in fact, in reality, it would be a different price. As I said this morning, if it was FOB San Diego, there will be a cost associated with bringing from San Diego to Mexico. So my understanding is that the actual cost would be different. I believe that would have been my understanding.”).

¹⁸ Defendants’ argument that Sharp should have filed suit or alerted the authorities when it supposedly became aware of the conspiracy overstates the evidence defendants cite, even accepting defendants’ characterization of it. Assuming that Samsung SDI and LPD offered the same price for a CRT (which as explained above is not true), that fact would not pass Rule 11 and Rule 12 muster as support for filing a Sherman Act claim because, among other things, it does not exclude the possibility of independent action. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (“[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”). Defendants also ignore that filing suit

Moreover, permitting a mitigation defense under these circumstances would contradict settled antitrust law holding that “each overt act that is part of the violation and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff’s knowledge of the alleged illegality at much earlier times.” *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (internal quotation marks omitted), *see also Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986) (holding plaintiffs had knowledge of a conspiracy prior to the limitations period but were nonetheless “entitled to pursue recovery of damages from overt acts proven to be in furtherance of the alleged conspiracy which occurred within the limitations period.”). The law is clear that knowledge of the conspiracy will not bar recovery for antitrust violations that are within the statute of limitations. Thus, defendants’ theory that Sharp’s supposed knowledge of the conspiracy in 2002 somehow forms the basis of a mitigation defense must be rejected.¹⁹

Courts have rejected similar attempts to claim that a victim’s failure to call the authorities or bring a lawsuit about a suspected antitrust conspiracy amounts to a failure to mitigate. For example, in *Westman Commission Co. v. Hobart Corp.*, 541 F. Supp. 307, 314 (D. Colo. 1982) a

or alerting authorities would not necessarily have brought a prompt end to the conspiracy. Defendants offer no proof that the authorities would have initiated an investigation at that time and under the circumstances of this at-best minimal notice, or that filing a civil lawsuit would have led the defendants to cease their illegal activities.

¹⁹ Defendants are well aware that the evidence they seek to admit under the guise of a mitigation defense should be considered, if at all, only with respect to their statute of limitations defense. Defendants have moved for partial summary judgment on statute of limitations grounds based on the same evidence, and Sharp has explained in its opposition to that motion why that motion fails and why the evidence is insufficient to show that Sharp suspected that CRT suppliers were conspiring. MDL Dkt. Nos. 3044, 3283. Defendants now seek to confuse the jury by improperly attaching a new “mitigation” label to the same unpersuasive evidence. *See Voda v. Medtronic Inc.*, No. CIV-09-95-L, 2011 WL 6210760, at *3 (W.D. Okla. Dec. 14, 2011) (“Although defendants present failure to mitigate as a separate defense, the court finds it is simply the opposite side of the laches defense. Both defenses have their genesis in plaintiff’s delay in bringing this action. The court will thus analyze the issue under the doctrine of laches.”).

1 refusal-to-deal case in which the court recognized that plaintiff Westman “ha[d] a duty to
2 mitigate,” defendant Hobart argued that Westman “did not mitigate its damages by filing for an
3 injunction.” *Id.* at 312. The court characterized this argument as “ridiculous,” in that it
4 “implicitly assumes that Hobart was guilty of a continuing violation of the antitrust laws, yet
5 attempts to place the onus of stopping that violation on Westman. . . . [A] defendant cannot claim
6 immunity from damages caused by its illegal actions because a plaintiff could have stopped them
7 by filing for an injunction.” *Id.* at 314-15; *see also Balboa Capital Corp. v. Graphic Pallet &*
8 *Transp., Inc.*, No. 13 C 6503, 2015 WL 514987, at *4 (N.D. Ill. Feb. 6, 2015) (“[D]efendants do
9 not cite and the Court has not found any support for the notion that a non-breaching party is
10 required to file suit, let alone do so as quickly as possible, to mitigate its damages.”).

13 Defendants also argue that Sharp could have mitigated its damages by ceasing purchases
14 of CRTs from the cartel members. *Opp.* at 40. This case involves a horizontal price-fixing
15 conspiracy between nearly all major CRT manufacturers, which raised prices of *all* CRTs. Thus,
16 Sharp had no reasonable option to purchase CRTs from another supplier. And it is laughable to
17 suggest that Sharp could have reasonably mitigated its damages by stopping its CRT purchases
18 altogether, as this would have forced Sharp to abruptly shut down its CRT television business,
19 subjecting it to significant losses. *See Litton Sys., Inc.*, 700 F.2d at 820 (no need to mitigate
20 damages where expense of mitigation might have exceeded savings); *Fishman v. Estate of Wirtz*,
21 594 F. Supp. 853, 891 (N.D. Ill. 1984) (“A plaintiff’s obligation to mitigate damages extends only
22 to virtually risk-free alternatives.”), *aff’d in part, rev’d in part*, 807 F.2d 520 (7th Cir. 1986).

25 Evidence and argument of an alleged “failure to mitigate” is irrelevant to this case,
26 improper as a matter of law, and should be precluded from trial.
27
28

Direct Action Plaintiffs' Reply in Support of Their MIL No. 9: Motion to Exclude Live Witnesses Who Were Not Made Available for Live Testimony in Plaintiffs' Case-in-Chief

Defendants' response appears to recognize that, if they request, DAPs should be permitted to examine, during their case-in-chief, any witness within the control of Defendants who is beyond the subpoena power of the Court. Fairness dictates no less. Nonetheless, Defendants hold this outcome hostage by demanding unwarranted concessions in an effort to control the presentation of the DAPs' case. The Court should grant the DAPs' motion and reject Defendants' demands.²⁰

I. Defendants are not entitled to control the presentation of the DAPs' case-in-chief through unlimited cross-examination.

Defendants' request for full examination of witnesses in the DAPs' case-in-chief is contrary to Federal Rule of Evidence 611(b), which limits cross-examination to the scope of direct examination. *See* Fed. R. Evid. 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility."); *United States v. Furr*, 528 F.2d 578, 579 (5th Cir. 1976) (district court did not abuse its discretion limiting cross-examination to the scope of direct examination during government's case where the defendant could recall the witness). The DAPs are entitled to present their case in the manner in which they choose:

Generally the plaintiff sets the agenda and controls the course of proof during this phase, in what is called his case-in-chief. Part of this control comes from the fact that he selects witnesses and has considerable freedom in deciding the sequence of presentation. Part of it comes from the fact that ordinarily cross by other parties is confined to the scope of direct and impeachment.

²⁰ Because Defendants do not offer any reason why the DAPs' motion should not be granted, this reply focuses on why Defendants' demands are improper and should be denied.

1 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:61 (4th ed. 2014); *see*
 2 *also Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, 2006 WL 1646110, at *2 (N.D. Cal.
 3 June 12, 2006) (party with the burden of proof entitled to present case first). Defendants' request
 4 for unrestricted cross-examination is an effort to hijack the DAPs' case-in-chief. That request
 5 should be denied.
 6

7
 8 **II. Defendants are not entitled to restrict the DAPs from using video testimony as
 9 permitted under the Federal Rules of Civil Procedure and Evidence.**

10 Similarly, Defendants are not entitled to limit the DAPs' use of deposition testimony to
 11 impeachment of live witnesses. Rather, Federal Rule of Civil Procedure 32 and the Federal Rules
 12 of Evidence permit DAPs to use deposition testimony for many purposes, including "to contradict
 13 or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by
 14 the Federal Rules of Evidence," Fed. R. Civ. P. 32(a)(2), to "use for any purpose the deposition of
 15 a party or anyone who, when deposed, was the party's officer, director, managing agent, or
 16 designee under Rule 30(b)(6)," Fed. R. Civ. P. 32(a)(3), and as independent, substantive
 17 evidence, *see, e.g.*, Fed. R. Evid. 803 (hearsay exceptions unaffected by witness's availability).
 18 Whatever preference there may be for live testimony, it cannot trump these express provisions of
 19 the Federal Rules.
 20

21 Similarly, Defendants' focus on *which* depositions are eligible for treatment under Rule
 22 32(a)(3) completely ignores *how* qualifying depositions may be used. The rule is clear: they may
 23 be used for "any purpose." Fed. R. Civ. P. 32(a)(3). Those unqualified words are fundamentally
 24 at odds with Defendants' request to limit how the DAPs may use qualifying depositions.
 25

26 Defendants' request to limit deposition testimony to "impeachment" would be an
 27 unwarranted departure from the Federal Rules. It should be rejected.
 28

Direct Action Plaintiffs' Reply in Support of Their MIL No. 10: Exclude Evidence or Argument Regarding Incomplete Pass-Through of Overcharges Through Affiliate Entities

Defendants mischaracterize MIL No. 10 as an attempt by Plaintiffs to exclude all evidence of upstream pass-through at trial. That is not the case. For the reasons set forth therein, the motion merely contends that evidence regarding the incomplete pass-through of overcharges from Defendants to their finished CRT product affiliates, where Defendants own or control those affiliates or vice versa, is irrelevant and unfairly prejudicial.²¹

As a result, Defendants' lengthy discussion in their opposition about why certain evidence relating to upstream pass-through may be relevant with respect to antitrust standing, application of the FTAIA, and assessing damages misses the mark. Although Plaintiffs do not necessarily agree with Defendants' recitation of the law and facts surrounding those issues,²² they simply do not, as Defendants claim, seek a blanket prohibition against all evidence of upstream pass-through that would allow Plaintiffs to shirk their responsibilities with respect to proving their antitrust claims and establishing damages.

MIL No. 10 raises only the narrow issue of whether Defendants should be prohibited from introducing evidence suggesting that their finished CRT product affiliates – which owned or controlled or were owned or controlled by Defendants – absorbed the overcharges caused by

²¹ As explained in its separate opposition to the Defendants' Motion *in Limine* No. 16, Sharp opposes admission of any evidence of pass-on downstream from Sharp during a trial of Sharp's claims. (ECF No. 3666)

²² Plaintiffs have briefed these issues at length at summary judgment, *see, e.g.*, ECF No. 3254 (Opposition to Defendants' Motion for Partial Summary Judgment for Lack of Antitrust Standing); ECF No. 3272 (Opposition to Defendants' FTAIA Summary Judgment Motions), and maintain that is the appropriate forum for resolving this question. *See Butler v. Homeservices Lending LLC*, No. 11-CV-02313, 2013 WL 6196545, at *2 (S.D. Cal. Nov. 27 2013) ("Motions in limine are limited to rulings on the admissibility of evidence, not for obtaining summary judgment rulings.").

1 Defendants' illegal price-fixing cartel. For the reasons set forth herein and in MIL No. 10,
 2 Plaintiffs respectfully request that the Court exclude such evidence from trial.
 3

4 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 12: Motion to Exclude**
 5 **Percipient Witnesses, Except for One Party Representative, from the Courtroom Unless**
 6 **They Are Testifying**

7 There is no dispute that Plaintiffs have properly invoked Federal Rule of Evidence 615,
 8 which indisputably requires, upon a party's request, that the Court exclude witnesses from the
 9 Courtroom, with the exception of one party representative. Such exclusion precludes witnesses
 10 from discussing testimony or having access to daily transcripts of the trial. *United States v.*
 11 *McMahon*, 104 F.3d 638, 640-641 (4th Cir. 1997) (affirming contempt order for violating Rule
 12 615 by reviewing daily transcripts). There is no also no dispute between the parties that this
 13 exclusion should not apply to expert witnesses.

14 The sole dispute is whether the Court's sequestration order should apply to the parties'
 15 opening statements. Courts in the Ninth Circuit and across the country commonly sequester
 16 witnesses pursuant to Rule 615 prior to opening statements. *See e.g. Actuate Corp. v. Aon Corp.*,
 17 2012 U.S. Dist. LEXIS 87185, 9-11 (N.D. Cal. June 18, 2012) (excluding witnesses under Rule
 18 615 after jury selection); *McMahon*, 104 F.3d at 640 (granting motion to exclude witnesses under
 19 Rule 615 before opening statements); *Currie v. Cundiff*, 2012 U.S. Dist. LEXIS 83022, at *2
 20 (S.D. Ill. June 15, 2012) (granting motion in limine excluding witnesses from the courtroom
 21 during trial, including opening statements and testimony, pursuant to Rule 615); *see also Pezzano*
 22 *v. Sears, Roebuck & Co.*, 1997 U.S. App. LEXIS 39328, at *4 (2nd. Cir. Nov. 24, 1997) (in
 23 enforcing a sequestration order pursuant to Rule 615, the district court asked parties if there were
 24 witnesses in the courtroom before opening statements). Even those courts who find that Rule 615
 25 does not apply to opening statements often exclude witnesses from opening statements as a matter
 26 of judicial discretion. *See e.g. Bolbol v. Feld Entm't*, 2013 U.S. Dist. LEXIS 14981, at *3 (N.D.
 27
 28

1 Cal. Feb. 1, 2013) (granting motion to exclude witnesses from opening statements); *Bingham v.*
 2 *United States*, 2005 U.S. Dist. LEXIS 13783, at *2 (E.D. Va. June 10, 2005) (same).

3
 4 To support their position, Defendants rely exclusively on *United States v. Brown*, 547 F.2d
 5 36 (3d Cir. 1976). There, the Court held that “we cannot say that the [District] court abused its
 6 discretion” in denying a request to exclude where the defendant “made *no attempt* to inform the
 7 district court why failure to exclude witnesses during the prosecutor's opening statement might
 8 prejudice appellant's case.” *Id.* at 40. (emphasis added).

9 Although the defendant did not explain the prejudice in *Brown*, here the prejudice is
 10 significant given the extensive deposition record in this case. Unlike in a criminal case, where
 11 depositions—particularly back in the 1970s—were rare, here there is a high likelihood that the
 12 parties will quote extensively from deposition testimony—or even play portions of testimony
 13 during their opening statements. In fact, in the Best Buy LCD trial, Toshiba’s counsel—who also
 14 represents them in this case—read extensively from the deposition testimony of several witnesses
 15 as part of his opening statement, culminating in playing video testimony of a witness. Ross Decl.
 16 Ex. I, LCD Trial Tr. Vol 2. 261-270 (July 23, 2013).

17 The purpose of sequestering witnesses is to keep them from changing their testimony in
 18 reaction to what they hear from other witnesses. *See* Fed. R. Evid. 615, advisory committee note
 19 (“The efficacy of excluding or sequestering witnesses has long been recognized as a means of
 20 discouraging and exposing fabrication, inaccuracy, and collusion.”). There is no difference from
 21 a witness hearing testimony played during an open statement or ten minutes thereafter during the
 22 presentation of evidence.

23
 24 As such, the Court should exclude percipient witnesses from the courtroom except when
 25 they are testifying, including during opening statements, and should prohibit witnesses from
 26 discussing their testimony or accessing daily transcripts of the trial.

Direct Action Plaintiffs' Reply In Support of their MIL No. 13: Exclude Argument or Evidence Regarding Purportedly Pro-Competitive Justifications for Defendants' Agreements Regarding CRT Price, Supply, Production, or Customers

Defendants' opposition to MIL No. 13 mischaracterizes the facts of this case and the relevant case law. This is not, as Defendants suggest, an "information exchange" case based solely on circumstantial evidence. Rather, this case involves one of the longest running and best organized price-fixing cartels in recent history, and Plaintiffs have and will present an abundance of direct evidence regarding the scope and breadth of the cartel. That evidence shows that Defendants engaged in a *per se* violation of the antitrust laws. In turn, Defendants should be precluded from presenting purported pro-competitive justifications for their behavior at trial.

The case law cited in Defendants' opposition does not undermine this basic premise. First, *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999), does not, as Defendants claim, support the proposition that when a "[p]laintiff's case is based *at least in part* on circumstantial evidence, there is no question that Defendants can [introduce pro-competitive evidence]." Opp. at 61 (emphasis added). In *Citric Acid*, the plaintiffs relied *exclusively* on circumstantial evidence and, as a result, the Court reaffirmed prior case law setting forth a test "to be applied whenever a plaintiff *rests its case entirely on circumstantial evidence*." *Id.* at 1094 (emphasis added).²³

In the *TFT-LCD* litigation, Judge Illston highlighted this fact and concluded that the "[d]efendants' reliance on [*Citric Acid*] [was] unavailing," because the plaintiffs in *TFT-LCD* had presented some direct evidence of a conspiracy. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 SI, 2011 WL 7724271, at *1 (N.D. Cal. Nov. 4, 2011). That evidence included: "evidence that defendants exchanged production and capacity figures at Crystal Meetings,

²³ The same applies to Defendants' reliance on *In re SRAM Antitrust Litig.*, No. 07-01819, 2010 U.S. Dist. LEXIS 132172, at *50 (N.D. Cal. Dec. 10, 2010), as the plaintiffs in that case also had "not produced direct evidence of an agreement to fix prices, but only evidence from which a reasonable fact finder could infer the existence of a conspiracy to do so."

1 Vendor Parties, bilateral meetings, and via joint ventures as a means of balancing production
 2 capacity and stabilizing prices.” *See id.* at *1. As set forth in their summary judgment briefing,
 3 Plaintiffs rely on the same exact types of direct evidence in this case. *See, e.g.*, ECF. No. 3279 at
 4 3-4.
 5

6 Second, Defendants rely upon cases that involve joint ventures – not industry-wide price-
 7 fixing cartels’ – where courts properly weighed the pro- and anti-competitive effects of the
 8 collaborative arrangement. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827,
 9 857-61 (N.D. Ill. 2010). The cases do not involve courts permitting participants in a hardcore
 10 price-fixing conspiracy to present pro-competitive justifications for their behavior. As a result,
 11 the authority cited by Defendants does nothing to undermine the relief requested in MIL No. 13
 12 and, therefore, the motion should be granted.
 13

14 Moreover, Defendants’ attempt to oppose the motion by pointing to the fact that Plaintiff
 15 Sharp has asserted a rule of reason theory in addition to a *per se* theory should be ignored. Sharp
 16 did not join MIL No. 13 or this reply, and Sharp’s claims based on the rule of reason are separate
 17 and apart from the strictly *per se* claims asserted by Sharp and the other plaintiffs, so this Court’s
 18 ruling should not depend on Sharp’s circumstances. In fact, Sharp recently indicated that it may
 19 seek a separate trial on its claims. *See* ECF No. 3666.
 20
 21

22 **Direct Action Plaintiffs’ Reply in Support of Their MIL No. 14: Exclude References to and**
 23 **Evidence of Defendants’ Non-Indictment**

24 MIL No. 14 is not, as Defendants claim, an attempt by Plaintiffs to “have it both ways”
 25 with respect to the results of the DOJ’s criminal investigation of price-fixing in the CRT industry.
 26 Rather, it is an attempt by Plaintiffs to prevent Defendants from presenting irrelevant evidence at
 27 trial that would have no other effect than to confuse the jury and prejudice Plaintiffs’ case.
 28

1 On the one hand, Defendant Samsung SDI's guilty plea and Defendant Chunghwa's
2 amnesty agreement are direct evidence of those companies' involvement in the CRT conspiracy.
3
4 On the other, the DOJ's decision not to indict certain other Defendants is not evidence of
5 anything with respect to those companies' involvement in the conspiracy. There could be any
6 number of reasons for why the DOJ exercised its prosecutorial discretion not to indict those
7 Defendants. As a result, Defendants should not be permitted to use that fact at trial to create the
8 false impression that they did not participate in the conspiracy or that they should not be held
9 liable in a civil context.
10

11 Moreover, Defendants' attempt to turn their opposition into yet another platform for
12 arguing why Samsung SDI's guilty plea should be excluded at trial should be rejected for the
13 same reasons set forth in Plaintiffs' opposition to Defendants' fifth joint motion *in limine*. See
14 ECF No. 3649.
15

16 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 15: Admit Testimony of**
17 **Summary Witness**

18 With MIL No. 15, Plaintiffs simply seek a pre-trial ruling that the Court will permit the
19 use of summary witnesses for certain limited purposes, a decision that will help inform Plaintiffs'
20 trial strategy and will largely dictate the length and scope of their case. If the Court permits
21 Plaintiffs to utilize their summary witnesses, Plaintiffs can significantly narrow their witness list,
22 streamline witness testimony, and ultimately shorten their trial presentation, thereby preserving
23 valuable judicial resources. This is especially important in this case, where the trial will likely
24 involve a myriad of parties and trial time will be limited. Defendants provide no reasons for why
25 that should not happen. Instead, they raise a number of issues pertaining to the presentation and
26
27
28

1 substance of the summary witnesses' potential trial testimony.²⁴ But the concerns they posit are
 2 premature and can be easily addressed at trial by the Court and the parties.
 3

4 First, Defendants claim that Daniel Gill's testimony regarding the "Glass Meeting"
 5 minutes would include "subjective interpretation and analysis" and would constitute "summary
 6 'rebuttal' testimony." *See* Opp. at 71-72. Both assertions are untrue. Mr. Gill will simply
 7 summarize certain objective criteria included within the minutes. Specifically, he will summarize
 8 information such as the date and location of a particular meeting, the number of participants, the
 9 names of the participants, and the companies where the participants worked. He will not draw
 10 any conclusions regarding the liability of any Defendant. As discussed in MIL No. 15, Judge
 11 Illston permitted a summary witness to provide this very type of testimony at a trial regarding the
 12 "Crystal Meeting" minutes in the *TFT-LCD* litigation.
 13

14 Similarly, neither Mr. Gill nor Sean Chen will provide any legal analysis or draw any
 15 legal conclusions with respect to Defendants' publicly filed corporate documents. They will
 16 simply summarize corporate relationships, ownership percentages by year, board membership by
 17 year, and other similarly objective criteria gleaned directly from the face of the various
 18 documents.²⁵
 19
 20
 21

22 ²⁴ Defendants suggest in their opposition that courts generally disfavor "summary" testimony.
 23 *See* Opp. at 69-70. However, the case on which they rely to support this contention did not
 24 involve summaries under Federal Rule of Evidence 1006. Rather, it addresses overview
 25 testimony, where a witness, either at the beginning of trial or at the end of trial, summarizes the
 26 testimony of other trial witnesses. *See, e.g., United States v. Fullwood*, 342 F.3d 409, 414 (5th
 27 Cir. 2003) ("While such witnesses may be appropriate for summarizing voluminous records, as
 28 contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the
 case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of
 Evidence of our precedent."). Rule 1006 summaries are separate and apart, and do not present the
 same dangers as overview testimony.

²⁵ Defendants argue that summary witness testimony is improper where the Court makes the
 ultimate determination regarding ownership or control. Defendants cite no precedent in support

1 Plaintiffs simply seek an advance ruling from the Court that these individuals will be
2 permitted to serve as summary witnesses on these topics, if the requirements of the Federal Rules
3 of Evidence are met. Plaintiffs do not seek, as Defendants suggest, a blanket ruling that Messrs.
4 Gill and Chen are permitted to testify on any topic of their choosing. Moreover, the concerns
5 raised by Defendants ignore that they will have the opportunity to object to any testimony and to
6 cross-examine both Mr. Gill and Mr. Chen at trial.
7

8
9 Second, Defendants argue that Plaintiffs have failed to quantify the volume of documents
10 that Messrs. Gill and Chen intend to summarize. Opp. at 72-73. Mr. Gill will summarize dozens
11 of meeting minutes, and both individuals will summarize dozens, if not hundreds of public filings.
12 By any measure, these documents are “so voluminous” that they cannot be conveniently
13 examined in court. *See* Fed. R. Evid. 1006. And if Plaintiffs are required to examine the
14 documents in court, such examination would significantly extend the proceedings.
15

16 Third, Defendants claim that a number of the documents that the witnesses will
17 summarize will be inadmissible hearsay. Opp. at 73. This claim is unfounded and premature. As
18 required by Federal Rule of Evidence 1006, summary witnesses may only summarize admissible
19 documents, and Plaintiffs certainly do not purport to use the summary process as a means for
20 introducing inadmissible evidence. Moreover, Defendants will have the opportunity, prior to any
21 summary testimony, to review and challenge the admissibility of any documents that will be the
22 subject of that testimony. As a result, there is no danger that the Plaintiffs’ summary witnesses
23 will serve as a conduit for the admission of otherwise inadmissible documents.
24
25

26
27 of that contention. Instead they argue that the summary witness may not provide legal opinions
28 or conclusions. But as stated above, neither Mr. Gill nor Mr. Chen intend to engage in legal
analysis or provide legal conclusions, and will instead only summarize objective criteria gleaned
from the face of the various documents.

1 Finally, Defendant Chunghwa argues that its pending summary judgment motion should
 2 somehow impact the Court's decision on whether Mr. Chen can serve as a summary witness.
 3 ViewSonic does not, as Chunghwa implies, concede any of the points raised in that motion.
 4 Rather, ViewSonic disputes Chunghwa's contentions, and has steadfastly argued that there was,
 5 and is, an ownership and control relationship among Tatung, Chunghwa and Jean. *See* ECF No.
 6 3263. Summarizing the various public corporate filings of these three entities is instrumental to
 7 telling that ownership and control story.
 8

9
 10 For these reasons and the reasons set forth in MIL No. 15, the Court should grant
 11 Plaintiffs' motion.²⁶ With respect to Defendants' offer to enter into possible stipulations
 12 regarding their corporate structures and relationships, Plaintiffs are willing explore that option,
 13 but do not think that the process should alter the Court's decision here.
 14

15 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 16: Exclude Evidence of, or**
 16 **References to, the Retailer Plaintiffs Purchasing Finished Products Containing CRTs from**
 17 **Plaintiff ViewSonic or Plaintiff Sharp**

18 In MIL No. 16, the DAPs seek to exclude as prejudicial evidence that the retailer plaintiffs
 19 purchased finished products from plaintiffs ViewSonic and Sharp on the basis that such evidence
 20 could be used by Defendants to improperly argue or imply to a jury that ViewSonic or Sharp may
 21 have passed on overcharges to their customers or are seeking duplicative recoveries. Since
 22 ViewSonic and Sharp are direct purchasers that bring suit only under the Sherman Act,
 23 Defendants are precluded from asserting that ViewSonic and Sharp passed on any overcharges to
 24 their customers. *See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494
 25 (1968) (holding that antitrust defendants are prohibited from raising as a defense that plaintiffs
 26

27 ²⁶ Defendants ask that the Court deny the Motion as premature. To the extent that the Court
 28 deems this Motion premature, the Plaintiffs reserve the right to seek the admission of summary
 testimony at trial.

1 passed-on or otherwise recouped all or some of defendants' overcharges by passing-on those
 2 overcharges to their customers). To allow otherwise would severely prejudice ViewSonic's and
 3 Sharp's Sherman Act claims. As a result, protections against that prejudice must be put in place,
 4 regardless of whether any downstream purchasers of ViewSonic or Sharp finished products also
 5 participate in the trial. Moreover, this situation only serves to highlight why a separate trial is
 6 required for the consumer class, and why Plaintiffs intend to again move for such relief at the
 7 appropriate time.
 8
 9

10 In their opposition, Defendants assert that any potential prejudice to ViewSonic and Sharp
 11 is somehow trumped by Defendants' need to argue that the retailer plaintiffs' damages stemming
 12 from direct purchases of CRT products from Defendants should be reduced on account of the
 13 retailer plaintiffs' purchases from third-party entities, such as ViewSonic and Sharp. Defendants
 14 appear to claim that the third-party purchases indicate that the retailer plaintiffs were able to
 15 mitigate their damages or exert some bargaining power over Defendants. However, even if one is
 16 willing to accept that leap in logic, as is discussed in detail in Plaintiffs' MIL Nos. 4, 8, and 10,
 17 such evidence is irrelevant, misleading, and unduly prejudicial and, therefore, should be excluded
 18 from trial. *See* ECF No. 3558.
 19
 20

21 For these reasons and the reason set forth in MIL No. 16, Plaintiffs motion *in limine*
 22 should be granted.
 23

24 **Direct Action Plaintiffs' Reply in Support of Their MIL No. 17: Exclude Evidence of or**
 25 **References to ViewSonic's Purchasing Team Moving Abroad After the Purchases at Issue**
 26 **in this Case Were Made**

27 ViewSonic replies to Defendants' opposition to MIL No. 17 only to address two incorrect
 28 factual assertions made by Defendants. First, ViewSonic's corporate headquarters currently is –
 and always was during the relevant period – located in California, not Taiwan as Defendants

claim. *See* ECF No. 3249 at 2 n.1. Second, contrary to what Defendants imply, ViewSonic seeks damages in this action based only on purchases of CRT products by ViewSonic America, not any by its foreign subsidiaries. *See id.* at 2-6. Regardless, neither of these facts is core to MIL No. 17. The motion is premised on the fact that ViewSonic asserts damages in this case only through part of 2004, when its procurement team was always based in California. Notably, Defendants do not dispute this in their opposition.

Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their motions *in limine*.

Dated: March 6, 2015.

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